I believe as Sheahy points out, if there is going to be a waiver in one of these types of cases, you're going to have to ask the defendant—

THE COURT: Could one not make the argument here, if he had pressed a Motion for Mistrial based on this, that it would be ineffective assistance of counsel? Be mistrial, convicted at a later trial, the argument would surely be made you were nuts to move for a mistrial. You had been told that this jury was, you know, within a few votes of acquitting me. What are you doing moving for a mistrial?

MR. LEWIS: You could make an ineffective assistance of counsel argument. In law school, that's [inaudible]. But I mean, you know, I think that's, first my view would be that would be a very, yes, you could make that argument, but it would be an incredibly weak one. Because if it's there, and it's that straight forward, then you don't know. Who knows? It's just a sort of weird take of this case that you happen to know what that vote was. And that anybody knows, any jury can turn around, you know, even if it is nine to three. I mean, it happens. It happened here. And he—

THE COURT: But who would elect to roll the dice, as opposed to being told it's already leaning, the dice are

already leaning nine to three in your favor. Do you want to go with that, or do you want to go back to a 50-50 roll of the dice? Most people would take the nine to three in my favor.

MR. LEWIS: Well, that's the point. If he—

THE COURT: Which seems to be what happened here.

MR. LEWIS: It should be the defendant that makes that, that takes that chance.

THE COURT: Mr. Lewis, does it, does it appear that the defendant was not consulted?

MR. LEWIS: I believe so.

THE COURT: Because the defendant was not present?

MR. LEWIS: Correct. Well, the jury, he was in the courtroom—

THE COURT: He was present.

MR. LEWIS: But there is no indication that, you know, there was a break, and he was consulted, and the trial attorney said—

THE COURT: I just didn't know whether this had occurred before the defendant was brought in at some point.

MR. LEWIS: No. I don't know if-- I believe he was in the courtroom when this, when the alternate juror was questioned.

THE COURT: I have some questions about other parts of the case before your time is up. If the record shows, as the Commonwealth states that the record shows the jury was only in the courtroom for one minute, how could the victim's antics performing for the jury, have been for longer than one minute? You claim that it was for several minutes.

MR. LEWIS: Right, and if—

THE COURT: And if they were brought in at 9:02 and then were brought out at 9:03, how could that have been, how could that be?

MR. LEWIS: I think defense counsel's Affidavit states that his belief was from the way the court officer told him, or pointed out that this was occurring sort forward to [inaudible] or behind fact, that the complaint had actually been there for a while. It wasn't just like hey, they just sat down there. It was they had been there for a little while, and that was what [he relied on].

THE COURT: Well, but if the record shows they were brought in at one specific time, which they generally are, they don't just wander, the jury doesn't just wander into the courtroom one by one, they're brought in by the Court Officer. Well, all right.

I also want to ask you, you talk in your Reply

Brief about conversations between the victim and the jurors. But wasn't there only, the only thing that the Court Officer mentioned a conversation between the victim and the alternate?

MR. LEWIS: Yeah, I mean, yeah, and—

THE COURT: So they weren't conversation[s].

MR: LEWIS: No, and my understanding—

THE COURT: There was just that one.

MR. LEWIS: --that he, that he saw him, that he approached the alternate in the hallway, and I believe what I may have been referring to in the, in my brief, was that the fact that because there was this interaction, there was no question in say even the complaint, to say hey, did you, when you went by the jury did you say anything? If so, what did you say? You know, anything of that nature, just to see if there was or if there wasn't.

THE COURT: All right. And on your ineffective assistance claim about failing to investigate the mental health of the complainant, what should the defense counsel have done to investigate? I mean,, is the fact that a young victim tells inconsistent stories and has a family member, in this case, not even a full blood family member, a stepbrother—

MR. LEWIS: Um-hum.

THE COURT: Is that enough to generate investigation? And how could you possibly get through with [Bishop Fuller] showing [the relevancy]?

MR. LEWIS: My understanding of, [inaudible] my understanding of Bipolar Disorder is that it has the strongest genetic link of any of the new disorders. And the argument that I was making is that there was at least enough there for him to look into, to do even a sort of preliminary investigation of something with a lower, um—

THE COURT: What's he going to do?

MR. LEWIS: With a lower threshold of privilege.

THE COURT: What would he do?

MR. LEWIS: You know, can you look at, can you even have the judge review, say, DSS records? Or try to get school records—

THE COURT: But that can't be done until after you make Stage II relevancy showing [Bishop Fuller]. And you can't possibly make it by saying that he's told inconsistent stories, and he has a stepbrother who's bipolar.

MR. LEWIS: Or may be you get in an, you know, an expert to look this stuff over and say, and say, is this enough, in your opinion, in your belief, whatever. You know, try to get more information that can make it, you

know, a recent decision on that.

THE COURT: Um, is there any affidavit from defense counsel about why he didn't undertake an investigation?

MR. LEWIS: No. There is a mention in his Affidavit he thought there was something in there about the other brother being bipolar, or something? That he sort of vaguely knew it, but that was it. That's all he knew.

THE COURT: And also you um, you refer to the Court Officer's statement to the defendant's family that the verdict was, or what went on in the jury room was a shame, or a sin, or whatever.

MR. LEWIS: Yes.

THE COURT: Um, while it's quite inappropriate, it should never have been said-- I mean, how do you know that that reflect saying more than that he disagreed with the verdict? What went on in there was sinful because he thinks the guy is innocent.

MR. LEWIS: Right. You know, I put it in there, just to reflect that you know, the defendant's belief at the time that he didn't believe that he had been the subject of a fair process, and that the integrity of the process had been compromised, in some way. He knows this alternate was in there, then he gets this statement, you

know, he doesn't know. He just, he doesn't believe he got a fair trial. And that was, that was put in there, that was part of his thinking at the—

I'm going to turn to the, if there are no more questions, I'll turn to the Plymouth matter. The defense counsel, at the close of the case, after the verdicts had come back, asked the judge, and bail had been revoked, the judge, he asked the judge, "Should I file the Motion for Mistrial regarding the alternate? Do you want me to argue that now?" Something to the effect of do you want me to argue that now, or do you want me to file a motion on it?

THE COURT: Um, if we conclude that the new trial should not have been granted in the Bristol case, then this second case would become moot. Is that correct?

MR. LEWIS: Um, yes, for grounds, yeah, if you got rid of the grounds during that yes, I believe so.

THE COURT: Okay. And even if we didn't decide it, how are you going to meet the second prong of [inaudible]? How would it have made a difference? Because this person, according to what I read in the brief, and what was said in the colloquy, first of all, didn't he admit to the facts in the colloquy and say he was pleading guilty because he was guilty?

MR. LEWIS: You can't use the colloquy if he goes

into it involuntarily or unintelligently. I mean, the colloquy doesn't, it doesn't involve that.

THE COURT: No, just some of the statements. He admitted that he did it. He said on the record under oath that he did these, he committed the crime. Are you saying that he was perjuring himself?

MR. LEWIS: I'm saying that he went into the plea involuntarily and [unintelligently]. If he thinks, if he goes in and takes the plea, he can't say-- I just, I don't see how you can take the colloquy in whatever it says, to justify of going in the lack of intelligence with a lack of [voluntariness]. He doesn't know—

THE COURT: Okay, but the Notice of Appeal had already been filed.

MR. LEWIS: Right.

THE COURT: The other case was already, the results of that trial were pending the outcome of the appeal.

MR. LEWIS: Right.

THE COURT: So no final judgement yet, or no final judgement of conviction. By the way, that's something that happens with some regularity, because appeals take a long time, various defendants have appeals of other cases pending—

MR. LEWIS: Sure.

THE COURT: --at the time they plead guilty to other offenses. Does that mean that their pleas aren't voluntary? If ultimately their appeal on some other case turns out to be successful, do we simultaneously have to undo everything they've plead guilty to in the intervening years?

MR. LEWIS: Absolutely not. I think this case is distinguishable for two, two separate reasons. Each one is sort of exceedingly unique in its own respect, but when they're combined, it makes it even that much rarer. I think procedurally this is a unique case, just because of the interrelationship of the two cases. They're virtually identical cases. I mean, it's the same judge, the trial lawyer, common charges, common complaint, very similar.

THE COURT: But I gather one other additional other complaint that was not in the other case.

MR. LEWIS: You know, it depends. All I'm saying is in this case it ends up, the trial judge ends up having one hearing for both cases, and is issuing one Order for both cases. So it, I think in that sense, the interrelationship of the two is exceedingly close, much-

The Court: ~~MR. GAGNE~~: But how does that cut? Because that might suggest that this person knows darn well he was just

convicted on the basis of the testimony of these very witnesses, who obviously he thought might be vulnerable? I mean, that suggests that there might be a very good reason to try to cut and run, and to do the best you can on a plea, rather than take another course.

MR. LEWIS: Not if you think you're innocent. And you get—

THE COURT: But no—

MR. ~~GAGNE~~ the Court: Wait a second, if you think you're innocent? Excuse me. We're not talking about innocence here.

MR. LEWIS: But if he believes, if he goes-- But anything he does after that Bristol conviction, it's a byproduct of counsel's ineffectiveness [inaudible].

THE COURT: No, but if it were in, if it were ineffectiveness at all, it was simply because of a quirk, something that you admitted unique; that a juror was in the jury room for two minutes. It had nothing to do with the evidence, and a jury who had just heard all the evidence had just convicted him, and he was pleading, he said, or his attorney said, because he wanted to avoid his family, which included his family, his nephew, from having a second trial. So why wouldn't that be the same? Even if it were reversed on appeal, it would have nothing to do with the

evidence in the case, and he's viewing the evidence in the case as strong against him. It's the victim, as you say, the same everything. And he was just convicted, so why wouldn't he say, as he did, "Well, I'm going to be convicted here, and I'm going to get more time, so I might as well plead to concurrent time."

MR. LEWIS: Paragraph 3 of the Defendant's Affidavit, which I believe is on page 130 of, or page 30 of the attachments, what he's saying, if you read why, it gives those reasons why he plead guilty, it talked about his family, or whatever, that relies on the existence of the personal conviction. And if that's not there, and I think as the rest of his Affidavit points out, as even as his request for pro se, his pro se request for transcripts in December of '99 for the Bristol case points out, false testimony. That was one of the grounds he thought was grounds for reversal of his own appeal. He didn't even know, if, say, assuming his attorney told him about this alternate juror issue, you would think, even if he thought it was going to take the whole appeal, it would have appeared in that pro se request for transcripts. But it's not there.

I think that, you know, in paragraph 9 of the Defendant's Affidavit says very clearly that if but for

that conviction, I never would have pled guilty. He was out on bail, why would he, and he could get it reversed right away and a mistrial declared, and stay on bail, get the bail reinstated, and you're out, you know, you're not in prison.

And I think it also goes, you know, saying not putting the family through it, you know, I think again, it relies on the conviction, but clearly that's not that big a concern, because he went to trial on the Bristol case. If he was so concerned about putting his family through it, he never would have gone through that. He would have just plead the whole thing.

THE COURT: But the statement was "I didn't want to put my family through it again."

MR. LEWIS: Because of the trial, because there is this conviction.

THE COURT: Because of the trial.

MR. LEWIS: Because there is a conviction. He doesn't know that it's [infirm] in this way, that it shouldn't even have been there. So going into this, [we don't have time zone] but going into that plea, in his mind, he has this conviction, and that's just the point. If the trial attorney had done what he should have done, what he said he was going to do, that conviction would not

have been there, and he would not have pled guilty.

THE COURT: Thank you, Mr. Lewis. Ms. Burbine?

MS. BURBINE: May I please the court? Caroline Burbine for the Commonwealth, representing Plymouth County. Judge Chin properly denied the Defendant's Motion to Withdraw his guilty plea in the Plymouth County case, where the colloquy established the defendant's pleas were voluntary and intelligent, and the record shows the defendant did not make them based on poor advice of counsel.

Judge Chinn's decision was well within his discretion. He had presided over the Bristol County trial, and he accepted the defendant's guilty plea for Plymouth County, and he was in the best position to determine that justice was done in this case. Um—

THE COURT: Can I ask you a question? Did the—

MS. BURBINE: Yes.

THE COURT: Because I couldn't understand this from the record, and I may have misread the briefs. The Commonwealth didn't recommend concurrent time, did it?

MS. BURBINE: No. The Commonwealth asked for on and after.

THE COURT: So there was no, was there a plea agreement here?

MS. BURBINE: It seems that the defendant was under the impression that if he went, if he offered a guilty plea in Plymouth County, he would receive concurrent sentences, but—

THE COURT: But the Commonwealth wasn't—

MS. BURBINE: During the sentencing phase, the Commonwealth asked for a—

THE COURT: For on and after.

MS. BURBINE: Yes.

THE COURT: So there was no plea agreement as far as you know?

MS. BURBINE: Yes.

THE COURT: And where could this impression have come from, the judge?

MS. BURBINE: Perhaps, a lot-- I obviously don't know. There is nothing in the record to tell us where that came from. But he states in his affidavit that he was certain that he would get, he had been assured he would get concurrent time if he pled guilty in Plymouth County. And I would just state that Judge Chin properly rejected his claim in his Affidavit that he was unaware of any grounds on which the Bristol County convictions could be reversed.

THE COURT: But what did the prosecutor say in response to the judge's question about the recommendation?